No. 1193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

STATE OF WISCONSIN EX REL. JOHN C. RIZZO,
Petitioner,

VS.

THE COUNTY COURT OF KENOSHA COUNTY BRANCH II, THE HONORABLE EARL MORTON, JUDGE OF SAID COURT PRESIDING THEREIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

DOMINIC H. FRINZI
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Petitioner

Of Counsel
NICHOLAS C. CATANIA
FRINZI, CATANIA, NEUBECKER & STYLER

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dominic H. Frinzi, on behalf of John C. Rizzo, respectfully petitions this honorable Court for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Wisconsin, entered in the above entitled case on November 29, 1966, and reaffirmed on rehearing on January 31, 1967.

OPINIONS BELOW

The memorandum opinion of the Circuit Court of Kenosha County, Wisconsin (R. 13-16), is unreported and is printed in Appendix B hereto, *infra*, pp. App. 2-6. The opinion of the Supreme Court of the State of Wisconsin printed in Appendix B hereto, *infra* pp. App. 8-16, is reported in 32 Wis. (2d) 642, (R. 118-127). The opinion of the Supreme Court of the State of Wisconsin on rehearing printed in Appendix B hereto, *infra*, p. App. 21 is reported in 32 Wis. (2d) 642 (R. 130).

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on November 29, 1966. (Appendix B, *infra* p. App. 7), (R. 117). A timely petition for rehearing was filed on December 14, 1966 (Appendix B, *infra* p. App. 17 was denied on January 31, 1967. (Appendix B, *infra*, p. App. 20), (R. 129).

The jurisdiction of this honorable Court is invoked under 28 U. S. C. Section 1257(3).

HOW FEDERAL QUESTION IS PRESENTED

The Federal Question was presented in the court of first instance by way of a Petition for a Writ of Prohibition from the Circuit Court of Kenosha County to the County Court of Kenosha County, Wisconsin. The denial of said petition in the court of first instance was appealed to the Supreme Court of the State of Wisconsin, which Court affirmed the order of the court of first instance. The order of the Supreme Court of the State of Wisconsin is the highest Court in that State, in which decision on that case could be had.

QUESTIONS PRESENTED

A. Was the petitioner denied his rights under the Fifth Amendment of the United States Constitution, when he was compelled, under a grant of immunity, to testify concerning past gambling activities in one county in the State of Wisconsin, and was then charged with a violation of the state gambling laws in another county of the State of Wisconsin, which crime was allegedly committed prior to the time of his compelled testimony?

B. Where an individual is compelled to testify under a state grant of immunity, and testifies concerning past gambling activities, does the individual have the burden of establishing in court that the compelled testimony may have or did furnish a link in a chain of evidence which could be used against him in a state prosecution for violating a gambling law?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Statute involved in this petition is: Wis. Stats. 885.34. This statute is set forth in Appendix A, *infra*, p. App. 1. The Constitutional provision involved is the Fifth Amendment of the United States Constitution, which states as follows:

> "Article V, No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF CASE

Petitioner, John C. Rizzo, was subpoenaed to appear in the City of Kenosha, Wisconsin, before the Honorable Harry V. Carlson, County Judge, Branch No. 2, acting as a Magistrate in conducting "John Doe" investigation, pursuant to Section 954.025 of the Wisconsin Statutes. The investigation consisted of examination under oath of the petitioner in secret, although from time to time the petitioner was permitted to leave the interrogation room and confer with counsel. The Magistrate was assisted in the interrogation by an Assistant Attorney General of the State of Wisconsin. During the interrogation, the petitioner claimed his privilege under the Fifth Amendment to the United States Constitution. (R. 24, 25 & 26; Appendix C, *infra*, p. App. 22).

The petitioner was ordered to appear before said Honorable Harry V. Carlson, in his capacity as County Judge. At said hearing on October 13, 1964 the Assistant Attorney General requested that the petitioner be granted immunity from prosecution, pursuant to Section 885.34 of the Wisconsin Statutes and moved the Court to grant immunity on the following three questions:

(1) "Did you ever have any connections with the Ogden Social Club in Milwaukee?"

(2) "Did you ever pay any money to Milwaukee police officials to operate the Ogden Social Club?"

(3) "Whether you had any knowledge regarding the murder of Tony Biernat?"

The petitioner was represented by counsel at said hearing. (R. 54, 55; Appendix C, *infra*, p. App. 23).

During the course of these proceedings, the attorneys for the appellant objected to the compulsion of testimony as to

the first two questions on the ground that the questions did not concern themselves with Kenosha County and would be remote to any investigation in that County. To this contention Mr. Dalton, an Assistant Attorney General, informed the Court that he did not feel that he was required to establish the connection "at this point." He also advised the Court that "during the investigation many things come up which relate to the activities in the county where the investigation is taking place." (R. 56, 57; Appendix C, *infra,* p. App. 23). The Court, in overruling the position taken by the appellant, stated: "But questions may relate to Salt Lake City before this particular proceeding in Kenosha County and that, as long as it is connected with the investigation in the John Doe proceeding." (R. 58; Appendix C, *infra,* p. App. 24).

The attorneys for the appellant further contended that in the event appellant was compelled to testify, that he be granted general immunity regarding any question answered relating to the subject matter. Mr. Dalton objected on the ground that immunity could only relate to the three questions under discussion and to nothing else. (R. 57, Appendix C, *infra,* p. App. 24). The Court stated that it would grant immunity on the *subject matter* of a particular question. The Court ruled that the witness could be asked questions which it described as "supplementary questions" dealing with the particular subject. (R. 59; Appendix C, *infra,* p. App. 24).

Immediately after said hearing, appellant was questioned in secret session in the absence of his counsel. During said interrogation, appellant admitted that he gambled in a gambling place known as the Ogden Club more than six

years ago. (R. 28, 29; Appendix C, *infra*, p. App. 24). He admitted that he gambled, that at the Ogden Club he had worked as a "stick man", and that to his knowledge a fellow named "Maurie" managed the club. (R. 30; Appendix C, *infra*, p. App. 25). He admitted that he knew one "Frank Balistreri", "Phil Alderisio", "'Wheezer' Covelli", and "Joe Gags." (R. 33, 34, 36, 37, 38, 39 and 48; Appendix C, *infra*, p. App. 25).

Petitioner alleged on information and belief that the records of the County Court, Branch II, Kenosha County, will indicate that the said "Wheezer Covelli" was granted immunity during the course of this investigation regarding activities in the City of Kenosha.

Thereafter, upon the completion of the John Doe proceedings on August 5, 1965, the said Honorable Harry V. Carlson, sitting as a Magistrate, issued a warrant for the arrest of the appellant, which charged a violation of Sec. 945.03 (1) of the Wisconsin Statutes, which charges the petitioner with having engaged in illegal gambling in Kenosha County. (R. 14; Appendix B, *infra*, p. App. 3).

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of the State of Wisconsin appears to be in conflict with several decisions of the United States Supreme Court. These decisions will be discussed later. The decision of the Supreme Court of the State of Wisconsin appears to establish rules of procedure that for all intents and purposes completely subvert the protection of the Fifth Amendment of the United States Constitution.

In the first place, the decision indicates that there is no apparent connection between gambling in one county of a state, as opposed to gambling in another county of the same state. The decision indicates this as a matter of law, and is in conflict with *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2nd 653.

The Court in the majority opinion states the burden of establishing a link in a chain of evidence which could lead to the petitioner, is imposed upon the witness. The burden of proving such a nexus is imposed upon the witness in the Trial Court. This rule is in conflict with *Counselman* v. *Hitchcock* (1892), 142 U.S. 547, 585, 12 Sup. Ct. 195, 35 L. Ed. 1110, which states:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. . . ."
>
> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It is significant that prior to the grant of immunity, the petitioner is under no obligation to discuss his past gambling activities with anyone. After the grant of immunity he is then placed in a position where he is given an affirmative burden of proof to establish that the compelled testimony could furnish a link in evidence which would result in his conviction. It is obvious the only manner the petitioner could affirmatively establish that the compelled testimony resulted in a link of evidence, would be for him to admit the offense. The use of the immunity device in this fashion certainly does not grant the petitioner a co-extensive protection that he possesses under the Fifth Amendment.

The Wisconsin Supreme Court further states the immunity device is "an aid in the prosecution of criminals". This view is in direct conflict with *Brown* v. *Walker* (1896), 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819, which holds, "The act of Congress in question, securing to witnesses immunity from prosecution is virtually an act of general amnesty".

The view of the Wisconsin Supreme Court may have some merit in the event the State of Wisconsin attempted to use petitioner's testimony against another person.

Since the petitioner himself is the defendant, it is clear the rationale of *Brown* v. *Walker,* supra, applies to the use of the immunity device in the instant case.

The decision of the Wisconsin Supreme Court completely ignores the conduct of the State of Wisconsin in the manner in which the immunity device was employed in the instant case. Over the objection of counsel for the petitioner, the record indicates that on the one hand the State of Wisconsin represents to one Court of Record that the requested

testimony was pertinent to its investigation. On the other hand, after obtaining petitioner's compelled testimony, the State of Wisconsin represents before another Court of Record that this testimony is not pertinent to the charge of gambling against the petitioner. The charge of gambling evolved directly from the said investigation. Repeated and continued conduct of this type on the part of the State makes a sham of the Fifth Amendment to the United States Constitution and the protection afforded an individual under a grant of State immunity. The Wisconsin Supreme Court decision places all of the burden on the witness or defendant and none whatsoever on the State, notwithstanding the inconsistent positions of the State before two different Courts of Record regarding the same evidence compelled from the petitioner.

CONCLUSION

For the foregoing reasons it is submitted that this petition for Certiorari should be granted.

Respectfully submitted,

DOMINIC H. FRINZI
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorney for Petitioner.

Of Counsel:
NICHOLAS C. CATANIA of
FRINZI, CATANIA, NEUBECKER & STYLER
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203